



4-8-1976

Joe White v. Commonwealth of Kentucky

Appellee's Brief 1971-SC-1083

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 75-1083

JOE WHITE

APPELLANT

V.

APPEAL FROM HARDIN CIRCUIT COURT
HON. J. T. HATCHER, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

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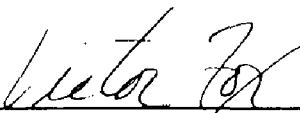
COUNSEL FOR APPELLEE

This is to certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Hon. J. T. Hatcher, Judge, Hardin Circuit Court, Court House, Elizabethtown, Kentucky 42701; Hon. Hobson L. James, Commonwealth Attorney, 12 The Mall, Elizabethtown, Kentucky 42701; and Hon. Richard D. Heideman, 425 South Fifth Street, Suite 201, Louisville, Kentucky 40202, Co-Counsel for Appellant, this 8th day of April, 1976.

FILED

APR 8 1976

MARTHA LAYNE COLLINS
CLERK
SUPREME COURT



Assistant Attorney General

SUPREME COURT OF KENTUCKY

FILE NO. 75-1083

JOE WHITE

APPELLANT

V. APPEAL FROM HARDIN CIRCUIT COURT
HON. J. T. HATCHER, JUDGE

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE QUESTIONS PRESENTED

- I. WHETHER OR NOT THE TRIAL COURT ERRED IN
OVERRULING APPELLANT'S MOTION FOR A DIRECTED
VERDICT?
- II. WHETHER OR NOT THE PROSECUTOR'S OPENING
STATEMENT WAS PREJUDICIAL, AND IF THE
ALLEGED BEHAVIOR WAS PRESERVED FOR APPEAL?

COUNTERSTATEMENT OF THE CASE

A. Nature of the Proceedings

Appellant was indicted by the Hardin County Grand Jury for Wanton Endangerment in the First Degree, an offense under KRS 508.060. On a plea of not guilty, appellant, represented by counsel, stood trial by jury in Hardin Circuit Court on September 17, 1975. The jury returned a verdict of guilty of wanton endangerment in the second degree and fixed sentence at nine months. This Court granted appellant's motion for appeal and he now appeals from the judgment below.

B. Statement of Relevant Facts

Two officers of the Elizabethtown Police Department went to the residence of appellant to serve a warrant (Transcript of Evidence, hereinafter TE, p. 44). After announcing themselves and asking for entry, they attempted to force their entry (TE p. 45). A shot was fired through the door (TE p. 45). No other adults were found in the dwelling, nor were any seen leaving (TE p. 84). Appellant, after a threat and the arrival of his mother, emerged from the dwelling and was arrested (TE p. 47). After his arrest, while being transported to jail, appellant stated he would shoot anybody trying to break through his door (TE p. 48).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN OVERRULING
APPELLANT'S MOTION FOR A DIRECTED VERDICT.

Appellant claims he was entitled to a directed verdict and that the case should not have been submitted to the jury. Any evidence tending to establish the accused's guilt is sufficient to take the case to the jury. Sells v. Commonwealth, 271 Ky. 447, 112 S.W.2d 692 (1938). If there is any evidence, however slight, which tends to show guilt of the crime charged or of any lesser included offense, it is the trial court's duty to submit the question to the jury. Hack v. Commonwealth, Ky., 444 S.W.2d 877 (1968); Rogers v. Commonwealth, Ky., 444 S.W.2d 548 (1969). Further, in testing whether the evidence is sufficient to allow submission, the trial judge must view the evidence in a light most favorable to the government. United States v. Milby, 400 F.2d 702 (6th Cir. 1968).

. . .

The evidence for the Commonwealth showed that a shot had been fired through the door (TE p. 45), that from that time on no one was seen leaving the building (TE pp. 72, 74), that appellant was the only adult in the building (TE p. 84), appellant's threat to the officers (TE p. 46), and appellant's statement that he will shoot any person who tries to break through his door (TE p. 48). Viewing this evidence in a light favorable to the Commonwealth indicates the trial court did not err in overruling appellant's motion and allowing the case to go to the jury.

II.

THE PROSECUTOR'S OPENING STATEMENT WAS NOT PREJUDICIAL, AND THE ALLEGED BEHAVIOR WAS NOT PRESERVED FOR APPEAL.

Appellant's second and third arguments raise the same basic point. Appellee therefore will consolidate its reply into one argument.

The alleged improper conduct of the prosecutor consists of the use of the word "warrant." The first instance was in the opening statement when the prosecutor told the jury the police officers were at the home of the appellant to serve a warrant. Appellant's objection was overruled and the word was used one more time (TE p. 43). As this Court said in Freeman v. Commonwealth, Ky., 425 S.W.2d 575, 578 (1967):

"Counsel has the right to direct the attention of the jury to all facts and circumstances that he in good faith believes will be allowed to develop in the evidence."

The prosecutor was referring only to what he expected to prove. He was not offering evidence of another crime. Appellee submits

and appellant concedes that the opening statement is not a part of the evidence. The prosecutor's use of the word "warrant" though possibly improper, certainly was not prejudicial. RCr 9.24; Holcomb v. Commonwealth, Ky., 501 S.W.2d 264 (1973).

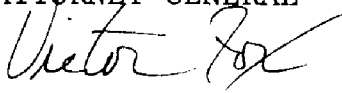
The remaining points of appellant's argument were not properly preserved and should not be considered by this Court (RCr 9.22). Appellant did not request an admonishment after the trial court proscribed further use of the word "warrant" (TE p. 43). He did not object during Officer Roland's testimony (TE p. 78). Nor did he object to the closing statements of the prosecutor (TE p. 161). Taylor v. Commonwealth, Ky., 432 S.W.2d 805 (1968); Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974). Further, a general objection is insufficient to preserve the point for appeal. Blanton v. Commonwealth, Ky., 429 S.W.2d 407 (1968).

CONCLUSION

For the foregoing reasons appellee submits that appellant suffered no reversible error, and the judgment of the Hardin Circuit Court should be affirmed.

Respectfully submitted,

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